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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

AMERICAN-PACIFIC CONSTRUCTION
COMPANY, a Corporation,
Plaintiff in Error,

vs.

MODERN STEEL STRUCTURAL COM-
PANY, a Corporation,
Defendant in Error.

No. 2272

REPLY BRIEF FOR DEFENDANT IN ERROR.

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FILED

JAN 20 1914

Records of U.S. Circuit
Court of Appeals
821

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REPLY BRIEF FOR DEFENDANT IN ERROR.

It is not the purpose to rewrite the original brief for the Modern Steel Structural Co., because as prepared and filed that brief, it is believed, covers every issue of law involved in the case. It is only the purpose of this brief to manifest palpable errors contained in the elaborate posthumous brief of counsel for the plaintiff in error. The original brief for the defendant in error was in the main prepared without having seen the original brief of plaintiff in error. We understood that counsel for plaintiff in error obtained leave to file a reply brief—not to recast his entire original brief, elaborating and extending it so as to cover 159 pages.

POINT I.

The contention of counsel for plaintiff in error that there never existed a valid contract, nor any contract between plaintiff in error and defendant in error as to the structural steel in question is untenable.

No doubt this court will have read the original brief for defendant in error before reading this, and will therefore be advised why, in the first instance, evidence of the loss by defendant in error of its duplicate of the original contract, and evidence of the search to find same and evidence of its contents, were introduced in evidence.

Late in the trial plaintiff in error finally complied with the request of defendant in error made at the beginning of the trial to produce its duplicate copy of the original contract (a thing it should have done at that time), and the same was offered in evidence without objection by plaintiff in error. When this occurred then all previous testimony relating to the loss of the original duplicate, search for it, and its contents, became immaterial. This duplicate of the original contract consists of a written proposition made by the defendant in error, dated Waukesha, Wisconsin, Jan. 4, 1907, and thereafter duly executed by the plaintiff in error and approved by the officers of the defendant in error in January, 1907, at which date it became a valid contract (Rec., p. 194).

By this contract defendant in error proposed to the plaintiff in error to furnish to it **“in good order the following described structural material, constructed in a workmanlike manner, described as follows,** and in accordance with the drawings furnished by Jos. D. Smedberg, and specifications also furnished by J. D. Smedberg, identified with marks: ‘Copy No. 1,’ ini-

tialed 'S. B. H. 12.30.06,' excepting as noted under 'REMARKS' on sheet No. 2 attached."

(The marked copy of specifications remained with plaintiff in error, but the carbon copy, or duplicate, was delivered by plaintiff in error to defendant in error, and in accordance with which the contract was being carried out until breached by plaintiff in error [Rec., pp. 104-5].)

"Namely, the structural steel and iron (except the grillage beams, bolts, separators and column bases mentioned on page 3 of specifications referred to above) for the Richelieu Realty Syndicate Theatre and Office Building, known as the Columbia Theatre; location—southeast corner of Van Ness and Geary streets, San Francisco, Cal.

"Delivery as follows: That portion indicated by Mr. Smedberg, shown within red lines on blue prints 3-S, 4-S, 7-S, dated by us on back of print as received Dec. 31, 1906, and 8-S dated by us on back of print as received Jan. 3, 1907, required to begin erection of steel work on stores to be shipped from our shop 30 days from our receipt of approved working detail drawings, signed by Mr. Smedberg.

"Balance of steel shipments to be 60 to 90 days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg.

"REMARKS: Our proposition is based on the substitution in part (as referring to 'KIND, CHARACTER AND FINISH OF MATERIALS,' beginning page 9, and 'INSPECTION,' beginning page 11 of the above specifications) of Manufacturers' Standard Specifications as found in Carnegie's Hand Book.

"Mill Test Reports, within said specifications, are proposed, as being satisfactory in the above

respects to Mr. Smedberg, and upon his request stating upon which portions of the work he will require such reports, we will comply therewith by furnishing same.

“We also agree that the tonnage is to be determined and paid for by certificates from the Western Weighing Association at the point of shipment. It is understood that the American Pacific Construction Company, at their own expense, will weigh same at the public scales in San Francisco, and should they prove that the weights so certified by the Western Weighing Association at point of shipment are not correct, we hereby agree to reimburse the American Pacific Construction Company the amount overpaid us.

“Price to be seventy-seven dollars (\$77.00) per ton; freight allowed to San Francisco, Cal. Correct figured weights of steel to govern amount of sale and all steel work to be accepted at our works by Mr. Smedberg or his authorized agent.

“Terms of payment as follows: 30 days net cash from date of invoices.

“Payable in New York, Chicago or Milwaukee exchange, free of expense to us for the collection charges.

“We are responsible for shop errors in work not erected by ourselves and for alterations, whether erected by ourselves or not, only when notified of same in writing before correction is made and given an opportunity and reasonable time to suggest remedy or to ourselves make alterations.

“It is expressly agreed that there are no promises, agreements or understandings outside of this contract and that no agent or salesman has any authority to obligate the Modern Steel Structural Company, by any terms, stipulations or conditions not herein expressed.

“This proposition is for immediate acceptance,

but although accepted, does not constitute a contract until approved by an executive officer of the Modern Steel Structural Company, and is subject to change or withdrawal until so approved.

“In case any difference of opinion shall arise between the parties to this contract in relation to the contract, the work to be or that has been performed under it, such difference shall be settled by arbitration by two competent persons, one employed by each party to the contract, and these two shall have power to name an uninterested umpire, whose decision shall be binding on all parties to the contract.

Ship via:

MODERN STEEL STRUCTURAL CO.

Accepted Jany. 17th, 1907, by S. B. H.

Approved by S. B. HARDING, *Pres.*

AMERICAN-PACIFIC CONSTRUCTION CO.,

THOMAS VIGUS,

General Manager.”

The defendant in error also put in evidence the general specifications for the structural steel and iron work for the building in question, consisting of 19 pages, being the same specifications plaintiff in error delivered to the defendant in error under which steel was to be gotten out (Rec., pp. 104-5-6-124). These specifications were prepared by Jos. D. Smedberg, Consulting Engineer, San Francisco, the engineer for the steel and iron work for the building (Rec., pp. 104-105). These are a duplicate of the original marked “Copy No. 1,” initialed “S. B. H. 12-30-06,” and were so treated by parties to the contract at all times. The marked copy remaining with the plaintiff in error.

SPECIFICATIONS.

These specifications in part read as follows: “**The Structural Steel and Iron of an Eight Story Office Building Theatre to be erected on the southeast corner of Van Ness and Geary streets, for The Richelieu Realty Syndicate, San Francisco, Frank T. Shea, Architect, San Francisco, Jos. D. Smedberg, Consulting Engineer, San Francisco.**

“**Mr. Joseph D. Smedberg**, the Consulting Engineer, is under contract with **Mr. Frank T. Shea**, Architect, to furnish those parts of the plans and specifications for the building which relate to the iron and steel frame and reinforced concrete work.

“He is also under contract with **The Richelieu Realty Syndicate** to supervise the inspection, to superintend the erection of the steel frame work, to check all bills rendered by the contractors for this portion of the work, and, in general, to see that all the contracts relating to this part of the building are faithfully fulfilled. The contract for the iron and steel work will be let on a pound basis erected.

“A separate set of specifications were prepared for the use of the computers and draftsmen in preparing detail plans.

“GENERAL:

“The steel construction described in these specifications is that for a new office building and theatre, southeast corner of Van Ness avenue and Geary street, San Francisco, Cal. The building is in plan 149 feet x 120 feet, and is eight stories high above the sidewalk, with basement extending 20 feet 3 inches below ground (Datum).

“The plan of construction is as follows:

“The general plans for the theatre portion of

the building being incomplete still, the intention is to erect the office building portion first and especially rush work on the first section columns, first and second story beams and girders for connecting theatre catilevers, etc., will be drilled in the field, as arrangement of theatre framing cannot be determined accurately at present, and this method will not delay any portion of the office building construction, due to lack of information regarding connection.

“The contract for grillage beams and cast-iron pedestals will be made separately in order to have foundations ready for first delivery of steel work, and cause no delay in the erection of frame.

“SPECIFICATIONS EXPLAINED:

“These specifications are supplemental to the contract already entered into for the constructional iron and steel work of this building between The American Pacific Construction Company, parties of the first part, and Richelieu Realty Syndicate, parties of the second part. They are the specifications referred to in the said contract, and which are to be considered a part of that contract.

“These specifications are intended to cover all the structural iron work for frame and reinforced concrete in said building. They are intended to co-operate with the drawings for the same, both those furnished by the Architect, and those furnished by the Engineer, as hereinafter specified, and what is called for by either is as binding as if called for by both. They are intended to describe and provide for a finished piece of work. **The contractor will understand that the steel construction herein described is also to be complete, in every detail and in every portion of the work, and all material entering into it is to be first class, and he will be expected to thoroughly understand**

the construction, and to fully inform himself in regard to any points that he may not clearly understand, for what is herein intended to be described, viz.:

“When necessary or desirable, he must apply to the Architect, or the Engineer, for further details or specifications during construction or before proceeding with his work.

“REQUIREMENTS OUTLINED:

“This contractor must furnish and set all the iron and steel shown or referred to in these specifications and called for by the said drawings hereinbefore referred to, and when the erection is completed, he must remove all the materials used in performing the work. He must furnish in all cases the exact sections, weights and kinds of material that is called for, or those of approved equivalent strength, and he must follow exact details, methods and instructions called for by these specifications and said drawings. **He must set the iron work as fast as may be considered practical in the judgment of the engineer, always keeping at least one story in advance of the masonry.** He will be expected to give this work his personal supervision, or have a man at all times to take care of it.

“DRAWINGS:

“The general dimensions, arrangements and sections required for the structural iron work herein specified are shown on the general structural iron drawings prepared and furnished by the engineer.

“The sections given are those of the Carnegie Steel Company’s manufacture. In general, these drawings are made to scale, but scale dimensions must never be used. These drawings, together with these specifications, are the property of the architect, to whom all copies must be returned on

the completion of the work. Detail or shop drawings required by the contractor, including drawings of every part and piece of the work, with all the lists, schedules, indexes, erection plans or other directions necessary for the proper manufacture, finish and erection of the work covered by these specifications and the said general drawings will be made and furnished by the engineer.

“Blue prints of the shop drawings, lists and schedules, as many copies of each as are necessary, but not more than five, will be furnished to the contractor for his use in the manufacture of the material. Another complete set of these prints, together with one complete set of prints of the erection drawings, will be furnished to the contractor for use in erection. One complete set of all the drawings, plans, list and schedules will be furnished to the inspector. All the above-mentioned prints will be furnished by the architect free of expense. Additional prints of any of these drawings may be taken by said contractor or inspector, if desired, at their own expense, but originals taken from the office for that purpose must be promptly returned.

“BUILDING LAWS:

“This contractor must comply with all the municipal or corporation ordinances and the laws and regulations relating to buildings in the City of San Francisco, California.

“KIND OF MATERIAL REQUIRED:

“All materials required for the trusses and all the material required for the flanges of riveted girders must be open hearth or Bessemer steel.

“All other material required for riveted members and the beams and channels used in the floors, with their connections, may be made of Bessemer

steel, unless in special cases it shall be otherwise specified.

“All machine driven rivets must be steel.

“The rods, bolts, anchors, lateral ties and all hand driven rivets must be of wrought iron.

“Bearing plates in masonry, pedestals under columns, separator, brackets under plates and filler blocks more than 1½ inches thick must be made of cast iron.

“CHARACTER AND FINISH OF MATERIALS:

“All steel used in this building must comply with the following specifications:

	Medium Steel.	Soft Steel.
“Minimum ultimate strength in lbs. per sq. in.....	68,000	60,000
“Minimum ultimate strength in lbs. per sq. in.....	60,000
“Minimum elastic limits in lbs. per sq. in.	32,000	30,000
“Minimum percentage of elonga- tion in 8 in.....	22%	26%

“Test pieces of medium steel must bend cold 180 degrees about a diameter equal to the thickness of the piece without any sign of fracture on the convex side of the bend. They must also stand the same bend after being heated to a light cherry red and quenched in water whose temperature is 82 degrees Fahrenheit.

“Soft steel must be used for rivets and medium steel for all other material. All steel must be free from all faults or defects of any kind, or of any indication of unsoundness. Each piece must be straight, free from wind and of proper section. A variation of weight in either way of more than two

per cent from that specified shall be cause for rejection.

“All wrought iron used in this building must have an ultimate strength of not more than 48,000 pounds per square inch, and elastic limit of not less than 26,000 pounds per square inch and an elongation of 20 per cent in eight inches. The wrought iron required for bolts and rivets must be so ductile that test pieces will bend cold 180 degrees flat without any sign of fracture on the convex side of the bend. All the wrought iron must be perfectly welded in rolling, fibrous, uniform and free from all defects. Each piece must be straight and of proper section.

“All the cast iron used in this building must be tough gray iron, free from cold shuts, blow holes or other serious defects. Its quality must be such that sample bars one inch square cast in sand moulds must be capable of sustaining on a clear span of four and a half feet a central load of 500 pounds when tested in the rough bar.

“PAINTING:

“All iron for the trusses must receive a coat of pure raw linseed oil at the rolling mills before being loaded on the cars.

“The covered surfaces (surfaces in contact and surfaces enclosed) of all parts of riveted members must receive one good coat of graphite paint after the pieces are punched and before they are assembled. All finished members must receive one complete coat of the graphite paint before they are taken from the shop or exposed to the weather. All surfaces that can be reached must have one coat of the graphite paint after erection. All truss members must have two coats of paint in the shop, and the enclosed surfaces of these members must have the two coats before they are assembled. All

bolts used in erection and remaining permanently in the building must be dipped in graphite paint before being placed in position.

“All pins and bored holes or other planed surfaces in the trusses or columns must be coated with white lead and tallow before leaving the shop.

“All painting must be done on dry surfaces and preferably warm ones. All dirt and foreign matter of any kind must be removed from the iron before painting. All scale must be removed from finished members before painting the first coat in the shop. All scale must be removed from material required for the trusses before it is oiled at the rolling mill.

“The paint used must be a superior graphite paint approved by the engineer.

“INSPECTION:

“The shop inspection hereby provided will be made by inspectors employed by the engineer.

“The contractor for the structural iron must furnish full and ample means for the inspection of all the material called for by these specifications, and of all the work required in fitting such materials for erection, and to this end he shall admit the architect's engineer and inspectors to any part of the mills or shops where work under these specifications is being carried on.

“To secure proper material as herein specified, one pulling test must be made from every heat or blow of steel, or rolling of iron, and one bending and one quenching test when such requirements are specified; if these are satisfactory, the whole will be accepted. If they are not satisfactory, others may be made as the inspectors may deem expedient. All test pieces must be prepared at the expense of the contractor for the structural iron. The test pieces of rolled steel and wrought iron

must be cut out of finished material and must not be less than one-half square inch in section. They must be at least ten inches long between fillets when turned down; when possible, they must be cut from the full thickness of the section from which the tests are taken.

“The number of test pieces of cast iron must be fixed by the inspector.

“The material used for full sized tests will be paid for at cost, less the scrap value of the material to the contractors, when the pieces are tested to destruction, and the test proved satisfactory; otherwise, it must be solely at the cost of the contractor. The use of testing machines capable of testing both specimens of material and the full sized members, together with all necessary assistance in handling and operating the same, must be furnished by the contractor free of all expense.

“All surfaces of all materials must be carefully examined by the inspectors, and all pieces that are a full section, free from flaws, straight and in every way satisfactory, must be accepted. This inspection will not, however, prevent the rejection of any piece at any later time, but before it is riveted in place in the building, if it is discovered that the piece is in any way unsuitable; ample assistance must be given by this contractor to the inspector in making this examination.

“All material manufactured under these specifications must be tested and examined as herein provided before the same is oiled or loaded on the cars for shipment from the mill or shop, and as soon after rolling as may be convenient for the mill or shop, and failure to comply with these specifications will be sufficient cause for the rejection of the material.

“The inspection in the shop must in general cover the identification of the material, the accu-

racy of work and fulfillment of specifications and drawings in every respect, and reports of finished weights and progress of the work, in all of which the inspector must have ample opportunity to do his work. All rejected material must be made good to the satisfaction of the inspector.

“All long measurements in the shop made by the inspector must be made with a steel tape, which must be compared with the shop’s standard measure to assure their agreement. In case of any disagreement between the inspectors and the contractors regarding the inspection appeal may be had to Joseph D. Smedberg, Consulting Engineer. His decision shall be final.

“BEAMS:

“In general, not more than three-eighths of an inch will be allowed by the drawings for clearance at each end of beams connecting two beams, and not more than one-quarter of an inch at each end of beams connecting to columns. All beams supported by connection angles, riveted to the webs, when finished, must measure out to out of such connection, angles not more than the length given on the drawings and not more than one-eighth of an inch less than that length. All beams connecting to columns without connection angles may be one-half inch shorter than shown on the drawings, must not be longer.

“All open holes must be true to the drawings and error in the distance from end to end between the open holes and the flanges at the ends of beams of more than one-sixteenth of an inch must not be approved by the inspector.

“Where connections are marked ‘Standard,’ the standard adopted for this particular job must be used. Beams or other materials used in floor construction, excepting bent plates used in connec-

tion, must not be heated for bending, cutting or fitting, unless so marked on the drawings.

“Beams split or permanently injured by work in the shop must not be used. Beams which are required to be bolted with separators in the building must be assembled and bolted together in the shop when practicable.

“COLUMNS:

“The distance from the center of the columns out to the open holes required for the connection of beams must be verified by the inspector. If, on account of the material overrunning in weight or on any other account, these distances are wrong more than one-sixteenth of an inch, the error must be remedied as the inspector may desire.

“All columns must be milled or ground at each end to a smooth bearing surface at right angles to the axes of the columns, and inspector must verify from time to time the adjustment of the machinery used in this work.

“All columns must be exactly true to length and any discrepancies in such lengths of more than one-thirty-second of an inch must be reported promptly to the engineer. If more than one-thirty-second of an inch too long, they must be milled shorter.

“Where columns coming over each other are designed to have the same exterior dimensions, a filler about one-thirty-second of an inch thick must be put under the spliced plates where they are riveted to the columns. These fillers must cover the entire area covered by the spliced plates. They will not be drawn on the drawings, but will be noted in the bill of material on each drawing where required. Columns must all be straight.

“RIVETED GIRDERS:

“Web plates must be arranged so as not to project above or below the flange angles. The lines showing the edges of such plates will be omitted from the drawings. In general, all stiffener angles must fit tight at both ends.

“Open holes and flanges must have the same accuracy required for beams.

“All riveted girders must be out of wind before leaving the shop.

“Compression members must have all butting ends planed smooth and exactly square to the center line of the member, and they must be assembled in the shop for the fitting of the splice plates and to insure perfect contact throughout. Such members must be entirely free from twists or bends and all work must be neatly finished, and first class in every respect.

“CASTINGS:

“The cast pedestals required for the columns must be planed, smooth on top and to exact dimensions. All holes for the bolts connecting to the columns must be drilled also to the exact measurements given, and the holes and other castings must be drilled when so marked. All surfaces marked ‘planed’ must be planed smooth and true for a perfect bearing as designed.

“RIVETS:

“Drifting that is liable to injure the material must not be allowed anywhere in erection.

“Shop rivets must be machine driven as far as possible.

“Rivet heads must be concentric with the necks of the rivets, and all rivets when driven must completely fill the holes and be tight.

“Rivets will be used in erection wherever possible.

“All rivets must be uniformly heated.

“Holes that do not match sufficiently to admit the rivet without drifting in assembling work in the shop must be reamed.

“All riveting must be done to the satisfaction of the engineer.”

These specifications state minutely the length, width and height of the building, and the lot upon which it was to be erected. They assert that they are intended to cover all the structural iron work for frame and reinforced concrete in said building. They are intended to co-operate with the drawings for the same, both those furnished by the architect and those furnished by the engineer, as herein specified, and what is called for by either is as binding as if called for by both. They are intended to describe and provide for a finished piece of work. “The contractor will understand that the construction herein described is also to be complete in every detail and in every portion of the work, and all material entering into it is to be first class, and he will be expected to thoroughly understand the construction and to fully inform himself in regard to any portions that he may not clearly understand,” etc.

Now, these specifications also very minutely describe the kind of material required, how each member is to be attached to other members, the material of which the rivets are to be composed, and how they are to be driven, the carrying strength of the steel per square inch, etc., and how it is to be painted, etc.

Indeed, it would be difficult to find a set of specifica-

tions which more minutely describe the structural steel for which plaintiff in error agreed to pay \$77 per ton.

These specifications are identified by their caption. Moreover, the correspondence between the parties leading up to the execution of the contract wherein it is stated that two copies of the specifications had been forwarded by plaintiff in error to the defendant in error (Rec., p. 86), one of which copies was thereafter returned to plaintiff in error by defendant in error with its proposed contract of January 4, 1907, and referred to therein as being identified with marks: "Copy No. 1," initialed "S. B. H. 12-30-06." The copy retained by defendant in error did not bear these identification marks, but had the plaintiff in error at the trial furnished to the Court its copy of these specifications so marked when it produced the original contract, such copy would have exhibited the marks in question. Not only so, but the copy of the specifications in evidence was undeniably the carbon copy of the one mailed to plaintiff in error with the proposal of Jan. 4 (Rec., pp. 86, 104, 105).

The drawings used in evidence were beyond doubt the drawings referred to in the contract, as furnished, and to be furnished by J. D. Smedberg. Not the slightest intimation can be found in the record by counsel for plaintiff in error that the drawings constantly referred to and used in evidence were not the drawings in contemplation of the contract.

Now, in addition to the written proposition for furnishing the structural steel, and its written acceptance by plaintiff in error, and the specifications quoted, there were many blue prints prepared by the Consulting Engineer showing the general plan of the building and indicating the structural steel required. These

were all furnished by plaintiff in error to defendant in error (pp. 79-84 and 85) and were present and used at the trial in examining the witnesses, both by plaintiff in error and defendant in error. They were not formally offered in evidence because it was agreed they would incumber the record; but they were shown to the jury and examined by the Court and used by counsel for plaintiff in error in examining its witnesses, as appears by the record (Rec., p. 235, Breite's evidence; Rec., pp. 244-5, Snyder's evidence; Rec., pp. 247-250, Galloway's evidence).

Not only so, but the uncontradicted testimony showed that a number of oilcloth drawings, onion skin drawings, **and material orders**, prepared by the defendant in error for the structural steel and approved by the Consulting Engineer were also received in evidence (Rec., pp. 125, 126; see also p. 306).

Even Breite, the hired expert of defendant in error, testified that the orders for material prepared by the defendant in error and o. k.'d by the Chief Engineer covered 262 tons. But he forgot to tell the Court and the jury that there were many typical stories in the building to which the detail drawings would apply as readily as they applied to the particular story for which they were drawn (Rec., p. 234). Breite testified that for detail drawings for an office or hotel building it would be worth \$1.50 per ton for such drawings (Rec., p. 237).

In cross-examination he testified:

“I have never been an architect, but I am an engineer. I was never an accountant in any manufacturing establishment that fabricated steel. I never employed men who worked with their hands

in fabricating steel, nor do I know the wages that the Modern Steel Structural Company at Wauke-sha, Wisconsin, paid its men for fabricating steel. The cost of fabricating depends on the wages paid and the work a man would turn out in a day. No man can give an intelligent answer without knowing these factors'' (Rec., p. 239).

The Witness (continuing): "I do not know what wages were paid in 1907 by the plaintiff, nor do I know what work was expected of a man to turn out in a day; in order to determine its cost, I should know these factors'' (Rec., p. 239).

Peter Zucco, called as a witness for the plaintiff in error, testified: that he had examined the papers annexed to the deposition of **S. B. Harding**. He was then asked by Mr. Humphrey about what tonnage was covered by them, and he said "about 256 or 257 tons."

"Q. Is there any drawing or design there from which it is possible to determine the exact tonnage that would go into that building?

"A. Absolutely not, sir'' (Rec., p. 241).

This witness did not examine the plans for the building.

Now, no one supposed, for an instant, that the exact tonnage could be determined until the steel had been fabricated and actually weighed. It was the intent and purpose of the contract that the actual weight, after being fabricated and put on the scales, would settle the exact tonnage. Plaintiff in error having breached the contract before that stage arrived, the defendant in error introduced the best evidence of which the case was susceptible of the quantity of steel the contract by inevitable implication covered. The contract between plaintiff in error and defendant in error implied

that there would be required the usual or average amount of structural steel in the erection of this building that is ordinarily required for a steel structural building of its dimensions, height and style.

The paragraph of the specifications entitled “REQUIREMENTS OUTLINED,” page 109 of the record, reads:

“This contractor must furnish and set all the iron and steel shown or referred to in these specifications, and called for by the said drawings hereinbefore referred to, and when the erection is completed, he must remove all the materials used in performing the work. He must furnish in all cases the exact sections, weights and kinds of material that is called for, or those of approved equivalent strength, and he must follow exact details, methods and instructions called for by these specifications and said drawings. **He must set the iron work as fast as may be considered practical in the judgment of the engineer, always keeping at least one story in advance of the masonry.**”

The paragraph quoted undeniably shows that the building was to be a steel frame one, and in construction the steel frame should be carried up at all times one story in advance of the curtain walls. In all such cases the steel structure carries the beams and girders. The specifications show this beyond question.

The specifications at page 108 read:

“These specifications are intended to cover all the structural iron work for frame and reinforced concrete in said building. They are intended to co-operate with the drawings for the same, both those furnished by the architect and those furnished by the engineer, as hereinafter specified;

and what is called for by either is as binding as if called for by both. They are intended to describe and provide for a finished piece of work. **The contractor will understand that the steel construction herein described is also to be complete in every detail and in every portion of the work, and all material entering into it is to be first class, and he will be expected to thoroughly understand the construction and to fully inform himself in regard to any points that he may not clearly understand.**”

It is a fundamental rule of law that what is implied in a contract is as much a part thereof as if written in the contract. It was implied in the contract and specifications that there would be used at least the ordinary amount of structural steel for the erection of a structural steel frame building of the size and of the type described in the specifications. No one familiar with the plans has placed the quantity at less than 1200 tons. The vice-principal of plaintiff in error stated it would require 1400 tons. Guided by the ordinary cubic contents, according to the undisputed testimony, a building of this size and type would ordinarily take 1500 tons. It was so testified by at least three witnesses in behalf of the defendant in error. Often in the closing of contracts for structural steel for a lump sum, the cubic contents of the building is the most important factor in determining the quantity required. It is a very safe rule in so far as office buildings are concerned. The supposition of one of the witnesses for the plaintiff in error was that the theatre work might have been greatly elaborated, involving an undue weight of steel for that part, and that this precluded the idea of determining accurately the quantity of steel required. However, no effort was made on the part of

the defendant in error to enhance the weight, on the theory that there would be an undue quantity of structural steel used. On the contrary, its testimony only tended to show what would be the average weight of a structural steel building, with a theatre in one part, of the dimensions in question. Now, the average weight of structural steel required for such a building, the evidence shows, was 1500 tons. As stated before, nobody ever suggested or intimated that it would require less than 1200 tons. The evidence adduced by the plaintiff in error that no one could determine accurately the quantity of structural steel that the architect might have required by adding unnecessary weight to certain parts of the members, is aside the question. We will assume that if the architect had run up the weight to 1700 or 1800 tons, still the defendant in error would have furnished same as it was to be paid a unit price per ton. However, nothing of that kind occurred, because all the steel for columns, girders and beams from the basement to the eighth floor for stores and office part had been fully settled by the engineer before the contract was breached.

The parties to the contract at all times after it was executed understood it thoroughly and gave it a practical interpretation. They did business under it, and plaintiff in error received from defendant in error two car loads of structural steel, of the value of \$3,021.09 under this contract and pursuant to its terms, but failed to pay for the same. Not a word was uttered by plaintiff in error to the effect that it did not understand this contract, or that it was invalid, until many months after it was breached by plaintiff in error. On its breaching the contract, the correspondence shows that it recognized its liability for the breach and took up

the question of damages for which it was liable, and much correspondence passed between the parties with reference thereto. Pages 132 to 151 of the Record contain the written demand of plaintiff in error to the defendant in error that breached the contract. The Record manifests inexcusable unfairness, if not dishonesty, of the plaintiff in error in failing to pay for the 39 $\frac{1}{4}$ tons of structural steel obtained under the contract and appropriated to its own use. It discloses a deliberate purpose, on the part of the plaintiff in error, to obtain valuable property from the defendant in error, and after breaching the contract, then to escape paying for the same, if by some technicality it might do so.

The uncontradicted evidence adduced at the trial justified the Court in charging the jury:

“While the making of the contract and its breach by defendant are both denied in the answer, the evidence shows without any conflict whatsoever that the contract was duly executed between the parties as alleged. It is true that it does not appear that the specifications or detail drawings for all the steel to be furnished under it had been completed by the architect, but it does appear without controversy that these specifications were so far completed as that both parties treated the contract as ready for execution to the extent the specifications and drawings had been furnished, and that plaintiff, at the direction and request of defendant, had entered upon its execution, so that for all purposes affecting the rights of the parties here involved the contract is to be regarded as having been duly executed.”

“As to the alleged breach of the contract by defendant, the action of the defendant, as disclosed

by the correspondence between the parties, and which is wholly uncontroverted, directing the stopping of all work under the contract and stating that the contemplated structure had been abandoned, justified plaintiff in treating the contract as at an end and constituted in law a breach of the contract by defendant.”

It is respectfully insisted by counsel for defendant in error that this charge of the Court was right and legal.

WHAT IS A CONTRACT?

A contract may be defined as an agreement between competent parties supported by a legal consideration and in the form, if any, prescribed by law, creating an obligation on the part of one or both to do or refrain from doing some lawful thing.

9 Cyc., 240.

7th Amer. & Eng. Ency. of Law (2nd Ed.), 90, defines a contract thus:

“A contract has been defined to mean an agreement upon a sufficient consideration to do or not to do a particular thing. It includes necessary implications. It comprehends not only what the exact words of the instrument literally signify, but also what the law necessarily implies from the language.”

State v. Laclede Gas Light Co., 102 Mo. 472, holds:

“Whatever the law necessarily implies in a statute or a contract is as much a part and parcel thereof as if expressly stated therein.”

Now, can there be a shadow of doubt in the mind of this court that every element essential to constitute a

contract, as defined above, obtained between plaintiff in error and defendant in error as to the structural steel in question?

CASES CITED BY COUNSEL FOR PLAINTIFF IN ERROR DISTINGUISHED.

At pages 74-76 counsel cites the following cases:

Nave v. McGrane, 113 Pac. 82, was an action by an architect to recover the alleged contract price for preparing building plans and specifications. It was held that the plans and specifications were so defectively drawn that the architect was not entitled to recover.

Price v. Stipek, 104 Pac. 195, was an action against an alleged purchase of jewelry where the vendee refused to carry out the alleged contract. It was held, where an offer to purchase jewelry requesting the shipment of goods listed on a printed memorandum containing a large quantity of goods of various kinds, qualities and prices and did not state how many articles of the particular kind were desired or the quantity or the price to be paid, the contract was so indefinite and uncertain as to those matters that it was void under Revised Code, Sec. 4999, making the entire contract void.

Jules Levy & Bro. v. Mautz & Co., 16 Cal. App. Rep. 666, an action on a contract for the purchase of goods for a period of years, held: A contract for sale must be certain as to the things sold and designate the price to be paid for, and if an executory contract of sale is uncertain and incapable of being made certain in the essential parts of the price to be paid for the thing sold, neither of the parties can be held to its terms nor recover damages for its breach.

Grafton v. Cumming, 99 U. S. 106. The syllabus reads:

“In order to satisfy the requirements of the Statute of Frauds of New Hampshire the memorandum in writing of an agreement for the sale of lands, which is signed by the parties to be charged, must not only contain a sufficient description of them, together with a statement of the price to be paid therefor, but in that memorandum, or in some paper signed by the party, the other contracting party must be so designated that each can be identified without parol proof.”

Gill Mfg. Co. v. Hurd, 18 Fed. 673, held:

“In order to constitute a contract, the minds of the parties must meet and all the terms of the same be agreed to. If any part of the contract is not settled by the parties, or a mode agreed upon to settle as to that part, there can be no contract.”

Almini Co. v. King, 92 Ill. App. Rep. 276, held:

“A contract which refers to plans and specifications, as herein made a part of the contract, but which are not attached to it and which contain nothing to locate or identify them in any way, is incomplete and not admissible in evidence.”

Each of the cases above referred to is clearly distinguishable from the case at bar. Indeed, we are unable to see any analogy between any of the above cases and the case at bar.

In Worden v. Hammond, 37 Cal. 61, it was held that under the contract specifications were an essential part thereof, as describing the material, the price and terms of payment, but as no specifications were attached to

the contract, nor in any way identified with the contract, the contract was void.

In *Willamette, Etc., Co. v. College Co.*, 94 Cal. 229, it was held that where the contract made the drawings and specifications an essential part thereof, as to material and the price of the work or terms of payment, and until they were thus annexed to the contract so that its entire terms could be ascertained by mere inspection and without oral testimony, the contract was incomplete.

Donnelly v. Adams, 115 Cal. 129, enunciated the same principle.

In each of these California cases there was a false recital of the contract. In the first case the quantity of work, the quality of material and all that were left for description in the specifications, and the contract said they were attached thereto, but as a fact no specifications were ever attached to the contract. Under those circumstances the Court properly held the contract incomplete and void.

In the second case the specifications which were supposed to describe the material, the price, the workmanship and time of payment were not attached to the contract, although the contract stated they were so attached, nor were any marks or description mentioned in the contract by which the specifications could be identified, and it was held that the contract was incomplete.

The same principle is announced in the third California case, but how different these are from the case at bar. In the case at bar the unit price per ton was agreed upon. The time for payment after the date of the invoices was fixed. The quantity was to cover all the structural steel for the building erected on a cer-

tain lot and of certain dimensions, all fully described in the specifications; the kind, quantity, quality and the carrying strength of the steel was all minutely described; and from the dimensions of the building and its nature and character and the kind of construction it was implied that the building would take, in all probability, 1500 tons of structural steel. No one ever suggested it could possibly take less than 1200 tons; and the plaintiff in error, in examining his witnesses, at all times assumed that it would take 1200 tons. The contract fixed a positive and definite method of arriving at the exact tonnage that would be used in the building, namely, by weighing the metal on scales after it was fabricated. However, plaintiff in error breached the contract after it had received over \$3000 worth of the structural steel in pursuance of the terms of the contract, and after the detail drawings had substantially been completed for the store and office part of the building from the basement to the eighth story, thus making it impossible to arrive accurately at the exact tonnage the building would have required had plaintiff in error not breached the contract. Now, no such case is cited by counsel for plaintiff in error. Indeed, no case of this type can be found where the seller was denied relief and where his damages were placed at a lesser sum than the actual profits he lost by being prevented from carrying out the contract. But the plaintiff in error asked the Court to go further. It asked the Court to assist the plaintiff in error in swindling the defendant in error out of the structural steel plaintiff in error received and appropriated to its own use, which, with interest to date, would equal about \$4500.

We assume no court can be found willing to assent to any such monstrous proposition.

PROPOSITION II.

Does the Evidence Sustain the Verdict as to the Damages Assessed by the Jury?

Samuel B. Harding, the president of the defendant in error, testified concerning the damages of the plaintiff substantially thus:

The total weight of structural steel shipped was 78,470 pounds, or approximately $39\frac{1}{4}$ tons, and at \$77.00 per ton, its value would be \$3,021.09. The approximate cost for the steel from the rolling mill was \$38.00 a ton, or \$1,570.00. Drawings at 90 cents per ton, \$35.33; shop labor at \$4.80 per ton, \$188.40; freight at \$15.00 per ton, \$588.75. Approximate total cost of the $39\frac{1}{4}$ tons, \$2,382.48 (Rec., pp. 127-128).

He testified that they had the total quantity of steel contracted for to complete the Columbia Theatre job, on the basis of 1,500 tons, and the cost under their contract for such steel delivered at Waukesha f. o. b. cars was \$38.00 a ton (Rec., pp. 128-130).

He testified that the job would require 1,500 tons and possibly more to complete it. He testified that Mr. Vigus, the general manager for the plaintiff in error, thought 1,400 tons would be the quantity required, while the architect and engineer stated 1,400 to 1,500 tons would be required.

Mr. Harding also testified that the labor of fabricating the steel would have cost \$4.80 per ton. That this was the reasonable cost of shop labor, including all work of the journeymen who work with their hands in the actual production of the work. The journeymen drill out the hole, punch, assembly, rivet, paint and

load the steel and other things. In the \$4.80 a ton is included the work of the journeymen. The total labor for drawings for 1,500 tons at 90 cents a ton would be \$1,350. Considerable of the drawings had been done when plaintiff in error breached the contract, and it would still cost to complete those drawings only \$680.72. That sum would have covered all the expenses in the completing of the detail drawings. This does not include the labor of the head draughtsman, but relates to the journeymen labor alone. The freight to San Francisco remained constantly at \$15.00 a ton. "I know the freight rate from Waukesha to San Francisco during that time remained at that figure because we had other business going to the Pacific Coast, both before and after this date, at the same rate per ton. The freight for the shipment of 1,460 $\frac{3}{4}$ tons that were not delivered would amount to \$21,911.25" (Rec., pp. 152-3).

The unfabricated material from the rolling mills delivered at Waukesha at \$38.00 a ton for the 1,460 $\frac{3}{4}$ tons not delivered to plaintiff would have cost \$55,508.50 (Rec., p. 153).

The paint required to paint the 1,460 $\frac{3}{4}$ tons with graphite paint would have cost \$3.75. Graphite paint is the kind required by the specifications. It would have cost for coal for power \$162.00; for fuel oil, \$72.00; for paint brushes, \$50.00; for punches, \$35.00; or in all \$694.00 for these items (Rec., p. 154).

The total journeymen shop labor for the entire job for 1,500 tons would have cost \$7,200. There had been incurred the shop labor for the journeymen, \$328.64, and to have fabricated, painted, etc., the remaining part of the 1,500 tons would have cost the Modern Steel Structural Company \$6,871.36 (Rec., p. 155).

Fifteen hundred tons at \$77.50 per ton would amount to \$115,500.00, and deducting the items of cost, which defendant in error would have been required to incur to have completed the fabrication and delivered the remaining part of the 1,500 tons f. o. b. San Francisco would have left a profit of \$34,470.00 (Rec., pp. 155-156).

Henry A. Sell, a witness whose deposition was taken at Waukesha and read in evidence by defendant in error, testified that he was 38 years old, resided at Waukesha, and was superintendent of the structural department of the Modern Steel Structural Company; that he had been in the employ of the structural company for eleven years and for three years he was shop foreman and was superintendent eight years. That during the last eight years he has been superintendent of the workshop and his duties are to supervise the work, estimate the work, estimate the work and supervise and figure on the cost. That he was familiar with the Columbia theater job, and, roughly speaking, with the plans and specifications and details of that job.

From his knowledge of the workings of the shop and the cost of labor, the cost in the spring and summer of 1907 of shop labor of journeyman labor, during the work of fabricating steel, for a job like the Columbia Theater, would be about \$4.75 a ton, which included the loading and painting of the steel. That is my judgment from my experience in that line (Rec., p. 174).

Frederick Hoffman, a witness whose deposition was taken by defendant in error at Waukesha and read in evidence at the trial, testified that he was a structural engineer by occupation; that he resided at Waukesha, Wis.; that he had been a structural engineer for five or

six years; that he was educated at a technical school in Germany; that he was in the employ of the Modern Steel Structural Company of Waukesha and had been for nine or ten years. That he was first employed as shop inspector and for the last five or six years before his deposition was taken he had been engaged as structural engineer; that his duties consisted of making general plans of structural steel structures; making detail plans; writing up specifications, and perhaps, occasionally checking detail plans for the company. To a certain extent he was familiar with the plans and specifications for the Columbia Theater job at San Francisco, which came into the shop of the plaintiff early in January, 1907. At that time he knew, from the plans and specifications, the length, width and height of the building, and generally in regard to its dimensions, and it was his judgment that it would require for the structural steel of said building 1,500 tons.

The witness, continuing, says: "That would be a fair estimate. I arrived at approximately 1,500 tons of structural steel by my past experience, considering buildings of similar construction and size, and considering the plans and specifications and the city ordinances of San Francisco, covering such buildings at that time. I had before me the city ordinances and specifications. I have no interest in this litigation."

"Rivets are used in riveting metal together and the angle-irons become a part of the material that is weighted before the metal is sent." That angle irons coming from the mill cost the same as the other steel and rivets at about the same. "Generally, riveting steel is somewhat less—less than the other" (Rec., pp. 176-7-8).

Cross-Examination, by Mr. Humphrey.

“I said it would take 1,500 tons of steel because I just estimated that on past experience with other buildings and passed my judgment on the specifications and what they called for” (Rec., p. 178).

F. W. Harding was present at the trial and testified in the case. He testified that he was 41 years of age, resided at Waukesha, Wis., and was vice-president of the Modern Steel Structural Company of Waukesha. Prior to becoming vice-president he was treasurer of the company and directing manager of the board of directors; that he was familiar with the contract that existed between the Modern Steel Structural Company and the American-Pacific Construction Company. That he examined it critically and carefully and the specifications and plans for the building in question known as the Columbia Theater, and “**I can state very approximately that at least 1,500 tons of steel would have been required to construct that building.**” That he had done a great deal in behalf of his company in taking contracts and was required to place valuations on work.

The witness further testified that the cost per ton of steel did not exceed \$38.00 a ton. Some was lower. “Plaintiff fabricated and shipped under its contract prior to April, 1907, 39¼ tons of steel, but did not get out the rest, because we were instructed by the American-Pacific Construction Company to stop all work on this contract. According to my best judgment, it would cost \$4.80 a ton for shop labor to have fabricated remaining 1,460¾ tons. My knowledge of the cost of fabrication is gained by experience because we keep honest record of all our contracts that pass through the shop. It is my business to know the value of work,

because I am continually doing business, and placing valuations on work. I have been in the business altogether for eleven or twelve years. The total cost of fabricating so far as shop labor was concerned, 1,460¾ tons that remained to be furnished when the work was stopped would have been \$6,871. There was some drafting remaining to be done. This drafting was worth 90 cents a ton; getting up the detailed drawings, for the labor alone, and to complete all of the drafting for this job would have cost \$680. We were using graphite paint. The paint for the remaining number of tons would not have exceeded \$375, and the power and coal would not have exceeded \$160, and the cost of fuel oil to complete the job would not have exceeded \$75, and the wear and tear on the machinery for getting out the balance of the work would not have been more than \$150 to \$160. I arrived at that figure by taking our plant and machinery depreciating and dividing it for that particular part of the work. It would have required also about 1,200 additional feet of lumber to get out the balance of the templates. The value of that would have been \$28.00 a thousand or \$32.00. The paper to have completed the drafting would amount to about \$2.00; and the ink for tracing the drawings would amount to \$2.50 or \$3.00, and there would have been blueprint paper; that would be worth about \$6.00 or \$7.00. The freight on 1,460¾ tons to San Francisco was \$15.00 per ton; and that was the rate at all times during the first half of 1907 (Rec., pp. 183-4-5).

We saved on the purchase of steel \$55,508.00. In the matter of small items like paint and coal, fuel oil, paint brushes, punches and additional sheets of tracing cloth, ink and blueprints and template lumber, de-

preciation of machines, a total of \$890.92, and to have completed the shop labor would have cost \$6,871.00 or the entire cost to us including freight would have been \$85,862.75. **Our sale price of the job was \$115,500.00, showing a difference of \$29,637.00**” (Rec., p. 186).

Witness (continuing): “We have overhead expenses, salaries that we pay to the heads of departments who are employed by the month, and our different officers, who are also employed and paid by the month, **and whether this job was in the shop or not, it would not have made any difference with regard to those expenses, as we keep our organization together anyway. I am positive I have given everything, every item of cost, that would go into the fabrication of this steel**” (Rec., p. 187).

F. W. Harding went into a most careful calculation of the items of expense that defendant in error would have incurred in completing the contract for 1,500 tons of steel, and his testimony showed that the defendant in error was entitled to recover for the steel already delivered, and the loss it incurred in consequence of the breach of the contract by plaintiff in error, the sum of \$29,637.00.

He stated 1,500 tons of steel would be required for the building. “I had to take the cubic foot rule because the general drawings were not completed for the entire building, but we knew the size of the building. The building was a combination of both office and theater building—a combination of both. There were some store buildings in the bottom or in the first story and then came the theater portion of which there was quite a lot of open space where the theater portion was, and above that, and I think partly on the sides, was

more or less office construction. That is in a general way, as I remember it. This building was to be constructed on the southeast corner of Geary and Van Ness, but was never built (Rec., p. 201).

The witness further testified: “**The cost of fabricating steel for a theater is more than the plain beam work of an office building. The theater portion of that whole building, where you might term that part of the work as being more difficult than the other, would not be more than five per cent of the total weight of the building. It would only be a small factor in the cost of the building**” (Rec., p. 202).

As against this testimony, plaintiff in error called four paid experts to prove, if possible, the damages incurred by the defendant in error were less than the overwhelming testimony tended to establish.

Mr. Breite, called by the plaintiff in error, testified:

“The actual drafting room, or drawing cost omitting overhead charges per ton for detail drawings for an office or hotel building, would be not less than **a dollar and a half a ton.**” The shop cost for details on theater work would run 50 cents higher than the ordinary office building would (Rec., pp. 236-7).

That he has examined closely the drawings and **material sheets** and papers attached to the deposition of S. B. Harding. “They comprised thirty-one tracings, 24 by 36 and 28 beam sheets, and 68 shop bills, and only cover the office portion of the proposed building. * * * **Only 262 tons are shown on the details of the shop bills.**” “There is no paper in the record or annexed to the deposition of **Mr. S. H. Harding** that would enable a man or an engineer to determine how many tons of steel would be required for the completing of the building referred to in said deposition. Before the number

of tons of steel for any particular big building may be determined, there must be a complete design showing each steel member that enters into the building. Without that complete design it is not possible to tell the number of tons (Rec., p. 234).

Cross-Examination, by Mr. Taylor.

The cross-examination of this witness shows that he had very meager experience and knowledge concerning the matter about which he testified (Rec., pp. 238-239).

He testified: "I never employed men who worked with their hands in fabricating steel, nor do I know the wages that the Modern Steel Structural Company at Waukesha paid its men for fabricating steel. The cost of fabricating steel depends on the wages paid and the work a man would turn out in a day. No man can give an intelligent answer without knowing those factors."

"I do not know what wages were paid in 1907 by the plaintiff, nor do I know what work was expected of a man to turn out in a day; in order to determine its cost I should know these factors" (Rec., p. 239).

Peter Zucco, called and testified for the plaintiff in error, said: "I am a consulting engineer. I have followed that profession for 21 years." His attention was called to the papers annexed to the deposition of S. B. Harding and he testified that he had looked at those papers and estimated the tonnage covered by those papers. He stated that the tonnage covered by those papers was about 256 or 257 tons.

By Mr. Humphrey (Q.): Is there any drawing or design there from which it is possible to determine the exact tonnage that would go into that building?

A. Absolutely not, sir (Rec., p. 241).

It is to be remembered this witness testified only as to the exhibits attached to the deposition of Mr. Harding.

No person in behalf of the defendant in error suggested that the exhibits attached to the deposition of S. B. Harding furnishes data from which the exact tonnage of the building could be determined (Rec., pp. 240-41).

C. H. Snyder, the third witness called by the plaintiff in error, testified: "The shop cost of fabricating steel for a theater in 1907 would, in my opinion, be about ten to twelve dollars a ton. It might be more than that." That it would be 50 per cent greater for fabricating steel for a theater than for an office building (Rec., pp. 242-3).

Cross-Examination, by Mr. Taylor.

The witness testified that he could not tell how large the building was to be; that he could not tell how many stories high the **Columbia Theater Building** was to be.

Q. Don't you know that it was to be 149 feet 6 inches one way by 120 feet the other way?

A. Probably you are right. I don't know. I don't recollect now.

Q. And the theater part placed in the building of the dimensions that I am talking about, 149 feet 6 inches one way by 120 feet the other way, eight stories high, or 112 feet, would occupy only a part of the building?

A. Yes, probably it would.

Witness (continuing): When I was talking about the additional cost of steel for a theater building, I meant that steel which related to the theater proper (Rec., p. 244).

He then takes the plans or blue prints, and says: “Yes, this is the plan.”

Q. What is there on this plan that shows the roof? Point it out to the jury.

A. It is shown right in there (indicating).

Q. Was that to be a glass roof?

A. I don’t know what the character of the roof was to be, but that is the roof in there.

* * * * *

Witness says: “This white space represents where the stage was. I am just judging by the looks of these plans. I have not seen the architectural plans.”

Q. Do these marks on this plan indicate iron work?

A. Iron work, yes. * * * These plans are for the iron work, and these lines would each represent a member of iron. The members of iron as shown on the sixth floor for plans might indicate anything, but would be a kind of structural steel that would be easy to fabricate. I don’t know of my own knowledge how high the theater proper came, but the theater, I should say, was below the roof. The other plans indicate how high the theater was and how long. These plans that have been exhibited here indicate the size and position of the theater. These drawings here indicate that this is all (referring to the sixth floor plans) of the theater, because here is a frame that looks very much like a box frame. That is all that I can tell you” (Rec., pp. 245-6).

John D. Galloway, called and sworn for plaintiff in error, testified:

“I have examined the drawings on file in this matter. These drawings, or plans, on file are not at all what is known as architectural plans. **They are what is known as steel drawings, some of them being shop**

details, and some of them being plans that are usually designated as engineering plans made by the architect. There is nothing there among those plans that would allow one to make an estimate of the total amount of weight in the building. The method of obtaining the weight of steel in a building by obtaining the cube of the building is regarded as merely the general method, and is not accurate in any sense of the terms. * * * The only way in which to determine accurately the weight of steel in a theater building would be to have the plans prepared and an estimate made, piece by piece, of each one. In the plans I have examined there is a central portion bounded on three sides by straight lines, and on one side by a curved line, which I am told was the portion intended for the theater'' (Rec., pp. 247-8).

Cross-Examination, by Mr. Taylor.

Witness: "I saw the plans there, showing the first story and the mezzanine story, and I should judge that the building was to have been nine stories high. * * * I don't know anything in the building law requiring the roof to be more than twenty feet high, and I don't know the restrictions of the building law in reference to a theater. I don't know that this building was planned so that the first story would have been twenty feet high. There is nothing on the plans to show that the greater bulk of the upper stories of this building was intended for offices. * * * The only plans I have seen are those on file here. These details that were drawn for steel. There is nothing on the detail drawings to show around the sides of the first story that there was to be stores. I think the height of the various stories could be found out from

the plans. In office buildings there are typical stories, and on typical stories the plans drawn for the girders and beams for one floor, if the others are typical, as a rule, could be adopted for the floors above" (Rec., pp. 249-250).

Q. Were you employed as an expert in this case?

A. That question is impossible to answer.

The Court: Were you employed to come and paid to come here and give your testimony?

A. Yes (Rec., p. 251).

The Court: You have defined that in your mind for the purpose of answering the question that you have just answered here; can you define it for the purpose of answering counsel's question on cross-examination?

A. I will answer this: that I think the portion there that would have been devoted, which I would have supposed to have been devoted to theatrical purposes, was at least 50 per cent of the total contents of that building as shown by those plans (Rec., p. 253).

The testimony of the four witnesses above named called by plaintiff in error is unimportant. Justice White, now Chief Justice of the Supreme Court of the United States, in *Hansen v. Boyd*, 161 U. S., *l. c.* 402, said:

"This Court will not determine the weight of the proof and thus usurp the province of the jury."

To the same effect is *Railroad Co. v. Cox*, 145 U. S., *l. c.* 606.

However, if this Court should assume the function of considering the weight and credibility of evidence, it would conclude that on every proposition of fact involved the evidence in favor of the defendant in error greatly preponderates.

The jury did not return a verdict for the full amount

which the testimony of the defendant in error would have justified. The verdict was for the moderate sum of \$17,372. The two carloads of steel that were shipped to defendant March 1st, 1907, and received by it at the contract price was worth \$3021 (Rec., p. 127).

The invoice for this was payable at thirty days, or April 1, 1907 (Rec., p. 92).

The verdict was rendered Sept. 18, 1912. The interest on this shipment for five years and five and one-half months, at 7 per cent, equaled \$1155. So at the date of the verdict that value of the two carloads of structural steel received by the plaintiff in error, with the interest, aggregated \$4176. This, subtracted from the amount of the verdict, left only \$13,169 as damages of the defendant in error occasioned by its not being allowed to complete the contract. The evidence beyond question sustains this verdict.

PROPOSITION III.

Erroneous Statement of Account.

The statement of counsel for plaintiff in error in his brief, pages 107 to 116, does not fairly state what the testimony for the defendant in error tends to prove.

By Mr. Humphrey (Q.): I hand you this and ask you if that is not a copy of the detail cost sheet of your work for the 39 $\frac{1}{4}$ tons?

F. W. Harding, the witness being examined, answered: "No, sir; I should say not. It includes all the work done in this contract up to a certain date. It includes draughting, office labor, the shop labor and freight charges not solely relating to the 39 $\frac{1}{4}$ tons" (Rec., p. 205).

Cross-Examination.

Q. That is a record of the work done under the contract?

A. Yes, I can go further. There was \$669 drawing labor, and here is \$328 shop labor (Rec., p. 203).

This witness did not testify that the \$669 labor for drafting related solely to the 39 $\frac{1}{4}$ tons. He stated directly the reverse of that. He testified that it covered all the expense for drafting details for the 1500 tons of structural steel for the job in question except \$680 still not done (Rec., p. 185).

Samuel B. Harding testified: That the detail drawings for the entire job would have cost 90 cents a ton, or \$1350, and it would still have cost to complete those drawings \$680.72; that there had been paid on the drafting \$669.28.

Of course, drawings already prepared and used in getting out the steel fabricated and shipped would largely apply to the remaining portions of the office part of the building.

In every office building there are many typical floors, and the detail drawings applicable to one floor are often applicable to many. The testimony of the two Hardings was entirely credible. Even the star witness for plaintiff in error, William M. Breite, testified that the detail drawings for an office or hotel building would be worth \$1.50 a ton and for a theater they would run 50 cents a ton higher (Rec., p. 234).

The overwhelming testimony tended to show that the shop labor for this job would not have cost exceeding \$4.80 per ton. (See Abs., p. 184; see testimony of S. B. Harding, Rec., pp. 152-5-8-9-160 to 162. See testimony of Henry Sell, Rec., p. 173.) He testified that a job like the Columbia Theater would cost

for shop labor about \$4.75 per ton, which included painting and loading of the steel. The statement at page 114 of the brief for plaintiff in error that Mr. Harding put the cost of fabricating the steel for the office building at \$8.00 a ton is false. Neither of the Hardings did anything of the kind; and even Breite, for plaintiff in error, testified that the cost for fabricating depends upon the wages paid and the work a man would turn out in a day. He testified: "No man can give an intelligent answer without knowing these factors" (Rec., p. 239).

The above also applies to the guesses of Snyder and Zucco and Galloway, the hired expert of plaintiff in error (Rec., p. 251). See also argument in our original brief, pp. 70-78.

We are conscious that we have given too much importance to this phase of the argument of counsel for plaintiff in error. We know, as every lawyer is presumed to know, that appellate courts do not weigh the testimony of witnesses, thereby usurping the province of the jury, but confine their attention to alleged errors of law, which are properly saved by the record.

PROPOSITION IV.

Arbitration.

At pages 118 to 119 of brief of counsel for plaintiff in error it is contended that it was necessary for defendant in error to submit its claim to arbitration before instituting this action. Such contention is untenable.

1st. No such defense was pleaded by plaintiff in error (Rec., pp. 62 to 69). Such defense, if it existed, should have been pleaded.

2nd. The language quoted from the contract by

counsel for plaintiff in error (his brief, p. 118) reads:

“In case any difference of opinion shall arise between the parties to this contract in relation to the contract or work to be, or that has been performed under it, such difference shall be settled by arbitration by two competent persons,” etc.

No difference of opinion ever arose between the parties to **this contract in relation to the contract or work to be, or that had been performed under it.** Without any possible excuse, plaintiff in error breached the contract; acknowledged the breach; obtained and converted to its own use two carloads of steel under the contract; acknowledged its liability for the steel, but afterwards has sought by legal jugglery to swindle defendant in error out of the value of the steel thus converted, and also the damages to which defendant in error is entitled.

3rd. It is a fundamental rule of law, settled by Federal decisions, that an agreement to refer a case to arbitration will not be regarded by the courts, and that they will take jurisdiction and determine the dispute between the parties notwithstanding such an agreement.

PROPOSITION V.

Statute of Limitations.

The record shows that counsel for plaintiff in error resorted to various dilatory pleas, designed to postpone the trial of this case and to keep it in court until, if this judgment shall be reversed, the statute of limitations will have run against the claim of the defendant in error, thus enabling plaintiff in error to convert to its own use the steel it obtained from the defendant in error without paying a dollar for the same. Appel-

late courts under such circumstances are not inclined to reverse a judgment, especially when, as here, the verdict is right on the merits. See authorities cited in our original brief at page 67.

POINT VI.

Unjust Complaints Against the Trial Court.

The intimation of counsel for plaintiff in error that he was misled by the District Court as to the manner of saving exceptions is gratuitous and unjust. The trial court, observing the lack of ordinary knowledge of counsel, made a suggestion, which distinguished counsel pushed aside as idle. No duty devolved upon the trial court to assist counsel for plaintiff in error in saving exceptions, and it seems very unjust that counsel should blame the trial court for his own mistakes (Rec., p. 130).

See Rule 10 of this Court.

Mr. Humphrey says the court was hasty in submitting the case to the jury after informing him that he was not taking proper exceptions. This assertion is not true in fact, as the record will show (see Rec., pp. 267-8). After Mr. Humphrey had saved all the exceptions he wanted to save, the court said: "You will have to take your chances on that. I don't know that that applies in this court." The court here came to a full pause, giving Mr. Humphrey every opportunity to save exceptions in the proper way as to instructions and as rule 10 of this Court requires. The Court then, after a reasonable pause, said: "You may retire, however, gentlemen. If that is the idea of counsel, all right."

Mr. Humphrey: "That is the exception we desire to take" (Rec., pp. 267-8).

It is impossible to see anything in the record on the part of the court that was not absolutely open, fair and kind toward the distinguished counsel for plaintiff in error.

Price v. Pankhurst, 53 Fed. 312, cited by counsel for plaintiff in error, at page 313, lays down the doctrine that inevitably obtains and which precludes this court, if it would, from paying any heed to the alleged exceptions to the charge given or the instructions refused. Caldwell, C. J., in writing the opinion of the court, said:

“The charge contains several propositions of law, some of which are undoubtedly sound. The rule is well settled that, if the entire charge is excepted to in gross, and any portion of it is sound, the exception cannot be sustained (citing many authorities). Upon the organization of this court, the practice on this subject, as settled by the uniform decisions of the Supreme Court, was formulated into a rule, and adopted as a rule of practice of this court, in the following terms:

“ ‘The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury, in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts, and those matters of law, and those only, shall be inserted in the bill of exceptions, and allowed by the court.’ Rule 10, 47 Fed. Rep. VI, I. C. C. A. XIV.

“This rule was designed to put an end to allowing bills of exceptions like the one in this case. It matters not that the judge may be willing to consent to such a bill. He cannot waive the rule,

so far as it relates to specific exceptions, if he desires to do so. The rule is not made for the Judge's personal protection or benefit, but for **the protection of suitors and the advancement of justice**. It is the duty of the party excepting to call the attention of the court distinctly to the parts of the charge he excepts to, and this must be done before the cause is finally submitted to the jury, to the end that the court may have an opportunity to correct or explain the parts of the charge excepted to, if it seems proper to do so. The practice which it has been intimated at the bar sometimes obtains of taking a general exception to the whole charge, with leave to specify particular exceptions after the trial, is a plain violation of the letter and spirit of the rule. The party who conceives the charge is erroneous in any respect, and remains silent, will not be heard to point out the error after the trial; and a general exception to the whole charge, any part of which is good law, is equivalent to silence. The rule is mandatory. Its enforcement does not rest in the discretion of the lower court. Its enforcement is essential to the proper and intelligent administration of justice." See rules 8 and 10 of this court.

However, this matter has been fully discussed in our original brief filed with the clerk before the oral argument of this case, pages 32, 38 to 45, inclusive.

The assertion of counsel for plaintiff in error (page 135 of his brief) that the Court's announcement was tantamount to an instruction that the parties had duly executed a contract calling for a quantity of steel estimated at 1,500 tons, is palpably erroneous. The Court stated no such thing in its charge to the jury, but quite the contrary. This is what the Court charged:

"The evidence on behalf of plaintiff should be

such as to enable the jury to determine with reasonable certainty, first, what the probable expense or cost would have been to the plaintiff to have performed the contract in its entirety, this to be determined from the different elements of cost involved in the work as disclosed in the testimony; and, secondly, **the probable gross quantity of steel, in tons, it would have required to complete the building.** Thereupon, by taking the total cost to plaintiff of fabricating and delivering the material, and deducting it from the gross sum produced by multiplying the number of tons of steel you find it would have taken to complete the building by the price per ton fixed in the contract, that is \$77, the difference or result will be the profit which plaintiff would have made on the contract, and which would represent the damages which, under the law, it would be entitled to recover.”

FINALLY.

Much of the brief of plaintiff in error is devoted to the weight of evidence. Such argument is irrelevant. Federal courts, where there is evidence tending to support a proposition of fact and evidence denying such proposition, will not weigh the testimony. The demurrer to the evidence offered at the close of the testimony in chief for the defendant in error was overruled (Rec., p. 233). It would have been palpable error to have sustained it, for in any event defendant in error was entitled to judgment to the extent of structural steel plaintiff in error had received under the contract.

But the record strikes deeper. If there had been merit in said demurrer, defendant, by offering evidence after it was overruled, waived it (see authorities in our Original Brief, p. 64).

Not only so, but plaintiff in error joined issue with defendant in error as to the damages it sustained, and adduced evidence on that subject. This estopped plaintiff in error from claiming that such evidence should not have been admitted.

Finally, we submit that the verdict was for the right party; that there was evidence sustaining it, and it is the duty of the Court to affirm the judgment.

SENECA N. TAYLOR,

WRIGHT and WRIGHT & STETSON,

Attorneys for Defendant in Error.

2
No. 2272

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN PACIFIC CONSTRUCTION
COMPANY (a corporation),

Plaintiff in Error,

VS.

MODERN STEEL STRUCTURAL COM-
PANY (a corporation),

Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals for the Ninth
Circuit:*

Plaintiff in error respectfully urges that the decision of this court affirming the judgment of the lower court be vacated and that there be a re-argument of this case.

In support of this petition, it urges the following considerations:

A careful analysis of the decision shows that the reasoning of the court in reaching its judgment of affirmance is as follows:

1. The objection that no damage is shown under the evidence does not present a reviewable question, because it does not appear that all the testimony submitted at the trial is contained in the bill of exceptions.

2. Petitioner contended that plaintiff (defendant in error) should have first maintained an action for goods sold and delivered and then by independent action sought damages for breach of contract. But as plaintiff was not required to split its demand and sue in one form of action for a part of its claim and in another for the balance, this contention cannot be maintained.

3. That the words "furnish" and "fabricate" are synonymous.

4. That if it were not for the fact that the proposal recites that the structural material shall be in accordance with drawings furnished by Joseph D. Smedberg and specifications also furnished by Joseph D. Smedberg, identified with certain marks, *there could be no question that the general description contained in the two instruments would sufficiently identify the materials to be manufactured to make the contract valid in all respects.*

5. It was never contemplated that the drawings to be furnished by Smedberg should have been

made and completed prior to the making and acceptance of the proposal.

6. That the proposal was not to furnish any specific *and predetermined pieces of given size and dimensions*.

7. That the minds of contracting parties must draw together and become as one touching the subject matter and the terms and conditions before a contract can be consummated, but in the present case that is what was done, and the purpose of the parties was defined with sufficient definiteness that **there can be no mistake as to their intention touching the steel and iron to be fabricated and delivered.**

8. It was never intended that drawings and specifications should be attached to proposal.

We most respectfully contend that the above premises from which this court concluded that the judgment should be affirmed are without support in the record and that the reasoning of the court by which it finds that there was a contract, and a breach by this petitioner, is illogical and cannot be sustained.

In maintaining its contentions petitioner submits:

1. The bill of exceptions *affirmatively and emphatically* shows that *it contained all the testimony submitted at the trial.*

2. Petitioner *never* contended that plaintiff was required to split its demand and sue in one action for part of its claim and in another action for

the balance and this court misconstrued petitioner's position.

3. The word "furnish" as used in the proposal of plaintiff meant, and was intended to mean, the delivery of fabricated steel, or, as specified in the proposal, "**structural steel constructed in a workman-like manner**" (Tr. p. 2). In other words, the steel was to be fabricated into certain shapes, lengths and sizes before it was to be delivered.

4. Independent of the recital in the proposal that the structural material shall be in accordance with drawings furnished by Joseph D. Smedberg, identified with certain marks, the general description referred to in the opinion is absolutely insufficient to identify the material, and the contract would be void for uncertainty.

5. It was necessary that the general architectural drawings be finished before the contract was complete or valid.

6. The proposal required plaintiff to furnish steel to be fabricated into certain shapes and sizes and the statement in the court's opinion to the contrary is without support.

7. The minds of the parties never met on the subject matter of the contract and could not have met, because it was not in existence.

8. The drawings and specifications by express terms were intended to be an identified part of the contract.

I.

THE BILL OF EXCEPTIONS AFFIRMATIVELY SHOWS THAT IT CONTAINS ALL THE TESTIMONY SUBMITTED AT THE TRIAL.

On the last page but one of the opinion the court say:

“Another objection urged is that no damage is shown under the evidence. This presents a question hardly reviewable in view of the certificate of the trial judge settling the bill of exceptions because it does not appear that all the testimony submitted at the trial is contained therein.”

This point was not made by the defendant in error for the obvious reason that the contrary appears.

At page two hundred and fifty-six (256) of the transcript of record at the end of the recital of the testimony is the following sentence:

“This concluded the testimony and the foregoing constitutes all the evidence in the case.”

The stipulation of counsel and the order of the court are made pursuant thereto (Tr. pp. 268-269).

It seems that the quoted portion of the court's opinion is clearly erroneous.

II.

PETITIONER NEVER CONTENDED THAT PLAINTIFF WAS REQUIRED TO SPLIT ITS DEMAND AND SUE IN ONE ACTION FOR PART OF ITS CLAIM AND IN ANOTHER ACTION FOR THE BALANCE THEREOF.

On the last page but one of the court's opinion it is said:

“Beyond this view counsel presents the view that the action should have been for material sold and delivered, having reference to the 391¼ tons of steel fabricated, shipped and delivered to the plaintiff at San Francisco as shown by the evidence. This overlooks the fact that the defendant breached its contract by directing the plaintiff to discontinue the further fabrication of steel and iron and refused to allow it to proceed further in fulfillment of its undertaking. *The plaintiff was not required to split up its demand and sue in one form of action for a part and in another for a part. Indeed, if the plaintiff had sued as counsel suggests, the question might have arisen whether it thereby waived its action for the breach of the contract.*”

It is quite evident counsel's position is misunderstood. At no time did he advance such an argument. *He urged that there was no contract and in the absence of a valid contract plaintiff could not sue in damage for a breach of a contract which had no existence, but was forced to an action to recover the value of the materials sold and delivered.*

Counsel further argued that the present action could not be maintained as an action for damages for a breach of contract because:

- (a) There was no contract.
- (b) There was no evidence of damage.

But counsel admitted that if the present action could be regarded as an action for the value of materials sold and delivered that the judgment

of the lower court to the extent of the value of the steel delivered, viz.: \$3021.09 might be affirmed.

Nowhere, and at *no* time, did petitioner urge that the demand was divisible. On the contrary, it urged that plaintiff had an action for goods sold and delivered and not for damages for breach of a contract which had no legal existence.

(See Revised and Supplemental Brief, p. 91.)

III.

THE WORD "FURNISH" AS USED IN THE PROPOSAL MEANT AND WAS INTENDED TO MEAN THE DELIVERY OF FABRICATED STEEL AS SPECIFIED IN THE PROPOSAL.

At page six of the opinion this court say:

"The questions to be determined are whether the alleged contract is sufficiently definite and certain in its description of the materials to be *manufactured and furnished*, and as it relates to quantity whether it was susceptible of being executed in accordance with intention of the parties."

And again at the end of said page:

"The general plan of construction is then delineated and the kind of material required and the character and finish thereof are specified *in minute detail*, so that there can be no mistake in construing these two instruments together touching the material *to be manufactured by the plaintiff and furnished* to the defendant for the construction of the theatre building."

These excerpts from the court's opinion are absolutely without support in the evidence. The

plaintiff (Modern Steel Structural Company) was a corporation organized for the special purpose of *manufacturing, fabricating and erecting steel structures* (Tr. pp. 75-76). By its proposal it was to manufacture and fabricate steel for the defendant (Tr. pp. 75-76). The proposal called for fabricated and not raw steel.

Where in the specifications or drawings is there any detail or drawing for the theatre building? **It was admitted that the general plan or design for the theatre portion of the building had not even been conceived.** The specifications state:

“The general plans of the theatre portion of the building being incomplete still, the intention is to erect the office building portion first and especially rush work on the first section columns, first and second story beams and sidewalk beams.”

(Specifications Tr. p. 108.)

The plaintiff's vice-president admitted the design for the theatre had never been prepared (Tr. p. 255).

Where, then, is the justification of that portion of the opinion quoted above and which reads:

“The general plan of construction is then delineated and the kind of material required and the character and finish thereof are specified in minute detail, so that there can be no mistake in construing these two instruments together touching the material to be manufactured by the plaintiff and furnished to the defendant for the construction of the theatre building.”

No one knew the design of the theatre. The architect had not made it. No one knew the size, form, shape or weight of any of the steel members that would enter into the theatre *when it was planned*. The specifications state that the plans for the theatre portion were never completed. The vice-president of plaintiff admitted they were never made. How then could plaintiff know how or what steel members to fabricate and finish? How could it know their sizes, forms or weights? Manifestly it could do no more than “*guess*” and this the law forbids.

IV.

Independent of the recital in the proposal that structural material shall be in accordance with drawings furnished by Joseph D. Smedberg and identified with certain marks, *the general description referred to in the opinion is absolutely insufficient to identify the material.*

It must not be forgotten that Frank T. Shea was the architect for the owner and Joseph D. Smedberg was the engineer employed by the owner under contract with the architect (Tr. p. 107).

The design or general plan is prepared by the architect and the detailed steel drawings are made by the engineer. Neither the plan, ~~and~~^{nor} ~~therefore~~ the detailed steel drawings for the theatre portion—the larger portion of the combined building—were made. The steel had to be fabricated according

to drawings which were based on an architectural design. This design was never made. How then could the steel which was to enter into this design be fabricated before the form or substance of the design was conceived?

If this is true, what becomes of the court's suggestion that the only doubt is suggested by the recital that the structural steel shall be in accordance with drawings furnished by Joseph D. Smedberg? Suppose the recital were omitted, what would guide plaintiff in fabricating the steel? Would it be free to follow drawings it might prepare and which would never fit in with the *architectural design to be prepared*? Manifestly without the plan and drawings there could be no contract.



V.

IT WAS NECESSARY THAT THE GENERAL ARCHITECTURAL
DRAWING BE FURNISHED BEFORE THE CONTRACT
COULD BE COMPLETE OR VALID.

The opinion is written on the assumption that a quantity of steel was to be purchased without regard to any particular building. This is fundamentally wrong. A quantity of steel *to be fabricated in accordance with a design to be thereafter drawn was to be furnished*. Until the design was drawn the steel could not be fabricated. Who could say what character of a theatre the architect intended to design? We know theatres are as different architecturally as there are different

architects to conceive designs. Some have ponderous steel members. Some have great trusses. Some have great arches. Some have one, two or three galleries, while some are absolutely plain. Until the plan of the Columbia Theatre was prepared no one could conceive the size, shape, weight or appearance of the steel members which would enter into its construction. Then how could there be a valid contract to *fabricate* steel members the size, shape or weight of which were not even conceived in the architect's mind? The plan or design was never completed; hence there was no valid contract.

VI.

THE PROPOSAL REQUIRED PLAINTIFF TO FURNISH STEEL TO BE FABRICATED INTO CERTAIN SHAPES AND SIZES, AND THE STATEMENT IN THE OPINION TO THE CONTRARY IS WITHOUT SUPPORT.

The court's opinion at page eight reads:

*“It must be remembered that the proposal was to furnish steel and iron by its weight and not to furnish any specific and predetermined pieces of given size and dimensions, * * *”*

This premise is wholly without support in the testimony. It is largely responsible for the court's conclusion of affirmance. With it must fall the affirmance of the judgment. *The contrary is true.* Plaintiff was required to purchase the steel at the mills and take it to its plant at Waukesha and there cut the beams to the required length and

assemble all the parts. Either that or it would have the work done at the mill. In either event the steel to be furnished to defendant was to be fabricated in sizes, shapes and weights to be determined by the general plan which was never prepared. There was no agreement for a definite amount of *fabricated* or *unfabricated* steel. The amount, sizes and shapes were to be taken from the plan which was never prepared. The figures fifteen hundred tons represent plaintiff's guess. It is not mentioned in the proposal. Convincing proof that it was a guess is given from the testimony where it appears the president of plaintiff frequently changed his opinion on the amount. (Tr. pp. 130, 131; 224, 227).

VII.

**THE MINDS OF THE PARTIES NEVER MET ON THE SUBJECT
MATTER OF THE CONTRACT AND COULD NOT HAVE MET
BECAUSE IT WAS NEVER IN EXISTENCE.**

The theatre was the larger part of the combined office and theatre building. Its design was never made. No one could even hazard a guess what it would be. The plaintiff made a proposal that was unlimited as to quantity, except by the design to be made by the architect. This design according to the construction required—whether truss, cantilever or plain—would require more or less steel and the cost of the fabrication would be greater or less according to the features, whether plain or

complex; whether arches, galleries and boxes or not; all these were essential parts of the contract and until they had been agreed on there was no meeting of minds.

The citations contained in the revised and supplemental brief show there is no contract here.

(See pp. 64-74.)

None of these authorities was mentioned or discussed in the opinion.

VIII.

**THE DRAWINGS AND SPECIFICATIONS WERE INTENDED TO
BE AN IDENTIFIED PART OF THE CONTRACT.**

The court at page eight of the opinion say:

“It is next insisted that the contract was not legally consummated because the drawings and specifications were not attached to the proposal.
* * * It was never intended that they should be attached to the proposal.”

The proposal copied in the court's opinion distinctly refers to and makes certain drawings and specifications part of it.

The petitioner's contention in this regard admitted that some of the terms and conditions of a contract need not appear in the contract itself, but may be referred to as being contained in an attached document. Still where such reference is made to a document as being attached, or as *being signed or identified by marks or otherwise,*

and it is not “attached” “signed” or so “identified”, *the contract is void*:

Because in such case the reference is false, and cannot be helped out by parol. This is unquestionably the rule, to which as yet there appears no exception.

(Brief, pp. 76-78.)

The specifications received in evidence were not the specifications referred to in the proposal.

We respectfully submit that the decision of this court should be vacated and the case reargued.

WILLIAM F. HUMPHREY,
*Attorney for Plaintiff in Error
and Petitioner.*

LENT & HUMPHREY,
Of Counsel.

CERTIFICATE OF COUNSEL.

William F. Humphrey, the attorney for the within named plaintiff in error and petitioner, does hereby certify that in his judgment the foregoing petition for a rehearing is well founded; and does hereby further certify the said petition is not intended for delay.

WILLIAM F. HUMPHREY,
*Attorney for Plaintiff in Error
and Petitioner.*